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In The

Supreme Court of the United States

October Term, 1993

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SUPREME COURT, U.S.

J.E.B.,

Petitioner,

v.

T.B.,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Alabama

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The single question presented to this Court for review is whether a male defendant in a civil action brought by the State of Alabama, has the right, under the Equal Protection Clause of the 14th Amendment to the United States Constitution, to challenge the State's use of its peremptory jury strikes which deliberately excludes males from the jury panel.

PARTIES IN COURT BELOW

Petitioner: J.E.B.

Respondent: State of Alabama, ex rel. T.B.

TABLE OF CONTENTS

Page

Questions Presented i

Parties in Court Below ii

Table of Contents iii

Table of Authorities v

Citation of Official Report 1

Statement of Jurisdictional Grounds 1

Constitutional Provisions 1

Statement of the Case 2

Argument 6

Summary of Argument 8

I. THE EQUAL PROTECTION PRINCIPLES UPON WHICH *BATSON* AND ITS PROGENY ARE FOUNDED ALSO PROHIBIT PEREMPTORY CHALLENGES BASED SOLELY UPON A PERSON'S GENDER 7

II. THE USE OF DISCRIMINATORY, GENDER BASED JURY STRIKES HAS A SUBSTANTIAL ADVERSE IMPACT UPON THE EXCLUDED JUROR, THE JUDICIAL SYSTEM AND SOCIETY AS A WHOLE 13

III. APPLYING THE STANDARDS OF *BATSON* AS EXTENDED TO GENDER BASED PEREMPTORY JURY STRIKES, THE FACTS OF THE CASE PRESENTLY BEFORE THE COURT ESTABLISH A VIOLATION OF THE EQUAL PROTECTION CLAUSE SUCH THAT A REMAND IS REQUIRED 16

TABLE OF CONTENTS – Continued

Page

IV. THE STATE'S HISTORICAL RIGHT TO USE ITS STRIKES IN A PEREMPTORY MANNER MUST YIELD TO A CHALLENGE BASED UPON THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT 21

Conclusion 29

TABLE OF AUTHORITIES

Page

CASES:

Batson v. Kentucky, 476 U.S. 79 (1986) ..... *passim*

Berry v. State, 422 S.E.2d 861 (Ga. 1992) 20

Carter v. Jury Commission of Green County, 396 U.S. 320 (1970) 13

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) 9

Craig v. Boren, 429 U.S. 190 (1976) 8, 9, 18

Dias v. Sky Chefs, Inc., 948 F.2d 532 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1294 (1992) 27

Edmonson v. Leesville Concrete Co., 500 U.S. ___, 111 S. Ct. 2077 (1991) ..... *passim*

Ford v. State, 423 S.E.2d 245 (Ga. 1992) 20

Frontiero v. Richardson, 411 U.S. 677 (1973) 9

Georgia v. McCollum, 505 U.S. ___, 112 S. Ct. 2348 (1992) ..... *passim*

Holland v. Illinois, 493 U.S. 474 (1990) 9

Holman v. Baker, 277 Ala. 310, 169 So. 2d 249 (1964) 24

Jackson v. State, 557 So. 2d 855 (Ala. Crim. App. 1990) 20

J.E.B. v. State of Alabama, Ex rel T.B., 606 So. 2d 156 (Ala. Civ. App. 1992), *cert. denied*, No. 1911717 (Oct. 23, 1992) 1, 16

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 8, 18

Murphy v. State, 596 So. 2d 42 (Ala. Crim. App., 1991), *cert. denied*, 596 So. 2d 45 (1991), *cert. denied*, 113 S. Ct. 86 (1992) 5

TABLE OF AUTHORITIES – Continued

Page

Orr v. Orr, 440 U.S. 268 (1979) 9

Norris v. Alabama, 294 U.S. 587 (1935) 26

Parker v. State, 568 So. 2d 335 (Ala. Crim. App.), *cert. denied*, 1990 Ala. Lexis 801 (Aug. 31, 1990) 20

People v. Smith, 602 N.E.2d 946 (Ill. App. 1992) 20

Pointer v. United States, 151 U.S. 396 (1894) 21

Powers v. Ohio, 499 U.S. ___, 111 S. Ct. 1364 (1991) *passim*

Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989) 18

Strauder v. West Virginia, 100 U.S. 303 (1880) 9, 26

Swain v. Alabama, 380 U.S. 202 (1965) 22, 23, 25, 28

Taylor v. Louisiana, 419 U.S. 522 (1975) 9

United States v. DeGross, 913 F. 2d 1417 (9th Cir. 1990) 10

Williams v. State, 548 So. 2d 501 (Ala. Crim. App. 1988), *cert. denied*, 489 U.S. 1028 (1988) 19

STATUTES & REGULATIONS:

1 Stat. 119 (1790) 23

17 Stat. 282 (1872) 23

28 USC § 1257(a) 1

TABLE OF AUTHORITIES – Continued

Page

36 Stat. 1166 § 287 (1911) 23

Alabama Rules of Civil Procedure, 1975, Rule 47 24

Alabama Rules of Criminal Procedure, Rule 18.4 (f)(2) 24

Alabama Code § 7275 (1909) 23

Alabama Code § 12-16-100 (1975) 23

Alabama Code § 864 (1923) 23

Alabama Code Title 30, § 53 (1958) 24

Alabama Code Title 30, § 60 (1958) 23

Federal Rules of Criminal Procedure, Rule 24(b) 23

United States Constitution, Amendment XIV ..... *passim*

MISCELLANEOUS:

4 W. Blackstone, *Commentaries* 350 (Cooley ed. 1899) 26

Coke on Littleton 156 (14th ed. 1791) 22

W. Forsyth, *History of Trial by Jury* 175 (1852) 21

Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305) 22

22 Hen. 8, c. 14, § 6 (1530) 22

25 Hen. 8, c. 3 (1533) 22

CITATION OF OFFICIAL REPORT

Certiorari to the Alabama Supreme Court is sought from the following opinion:

J.E.B. v. State of Alabama, Ex rel T.B., 606 So. 2d 156 (Ala. Civ. App., 1992), *cert. denied*, No. 1911717 (Oct. 23, 1992).

STATEMENT OF JURISDICTIONAL GROUNDS

Jurisdiction for review by this Court was invoked by your Petitioner pursuant to 28 USC § 1257(a). The holding of the Circuit Court of Jackson County, Alabama, as affirmed by the Alabama Court of Civil Appeals, with certiorari denied by the Alabama Supreme Court, denies the Petitioner his rights to the equal protection of the laws under the 14th Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS

United States Constitution

Amendment XIV
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny

any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action originated in the Circuit Court of Jackson County, Alabama upon the Petition of the State of Alabama, ex rel. T.B., alleging J.E.B. to be the father of a child born to T.B. The matter was called for trial on October 21, 1991 and the Court proceeded to empanel a jury by the struck jury method. After voir dire by the Court and all parties, the jury was struck. Counsel for the State used nine of its ten peremptory strikes to eliminate male members of the venire. Before the jury was empaneled. Petitioner challenged the State's use of its peremptory strikes to eliminate the male jurors from the panel based solely upon their gender, in violation of the Equal Protection clause of the 14th Amendment to the United States Constitution by requesting the Trial Court to conduct a hearing in the manner established by this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), to determine the discriminatory nature of the State's use of its peremptory strikes. The Court overruled Petitioner's objection without hearing and denied his request to follow the procedures established by this Court in *Batson v. Kentucky*.

Specifically, prior to the jury being empaneled. Petitioner made the following challenge to the State's strikes:

MR. PORTER: Judge, before the jury is empaneled, I propose to the Court that I do not know the appropriate method to do

this, we would challenge the State's strikes on the *Batson* decision and other decisions that have followed that I have heard and understand that gender based strikes based upon gender are just as [in]valid on race strikes based upon the race – the State strikes with the exception of one were males. Virtually none of them answered any questions whatsoever which would show prejudice or bias in any way, and I submit to the Court that they were basically struck solely upon gender.

THE COURT: You're talking about gender strikes?

MR. PORTER: Yes, sir. Gender strikes. Again, I propose to the Court that I don't know exactly how to do this. I have never done it especially on gender.

THE COURT: You are not raising a race question? I am going to deny your motion – your challenges – on the jury that's been empaneled on the basis of gender strikes.

MR. PORTER: We would also point out to the Court that the venire is made up of approximately seventy-five percent women, which also adds to the fact

that he has struck all but one of the men.

THE COURT: For the record, I will relate that there were 62 jurors on this morning's voir dire, and I did not need all 62 so I instructed the Clerk to take every other name until we got 36. That's the way these people wound up where they are. I overrule your objection and deny your motion.

(A jury was sworn and empaneled.) [JA 23]

Thereafter, a jury consisting of 12 females was empaneled and the case proceeded to trial. At the conclusion of the trial, the jury found and determined J.E.B. to be the father of the child, and the Court entered judgment thereon. [JA 24]

Petitioner subsequently filed a Post-Judgment Motion requesting an Order of Judgment Notwithstanding the Verdict, or in the alternative, a New Trial. [JA 26] As a portion of the grounds for such Post-Judgment Motion, Petitioner again raised the defendant's right to Equal Protection of the law as guaranteed by the United States Constitution. Petitioner challenged the State's use of its peremptory strikes to strike males from the jury panel based solely upon their gender and further challenged the Court's failure to require the State to articulate a nondiscriminatory reason for challenging the jurors, in accordance with the procedures established by this Court

in *Batson v. Kentucky*. In denying Petitioner's Post-Judgment Motion, the Trial Court specifically held "that the *Batson* doctrine does not extend to gender based strikes".

Thereafter, on January 24, 1992, Petitioner gave Notice of Appeal to the Alabama Court of Civil Appeals from the Court's Orders establishing paternity. Petitioner submitted the following issue to the Alabama Court of Civil Appeals:

> "The Trial Court erred in failing to allow the Appellant to challenge the State's peremptory jury challenges based solely upon gender in violation of his rights to equal protection of the law." (Appellant's Brief, p.6)

In affirming the Trial Court's holding, the Court of Civil Appeals opined that the Alabama Supreme Court had "declined to extend the *Batson* principle to gender based strikes", based upon the decision of *Murphy v. State*, 596 So. 2d 42 (Ala. Crim. App., 1991), *cert. denied*, 596 So. 2d 45 (1991), *cert. denied*, 113 S. Ct. 86 (1992). [JA 38] Thereafter, on July 17, 1992, the Alabama Court of Civil Appeals denied Petitioner's Application for Rehearing. [JA 38]

On July 31, 1992, Petitioner filed his Petition for Writ of Certiorari to the Court of Civil Appeals, in the State of Alabama Supreme Court and again presented the issue of gender based jury strikes to the Court, specifically stating as follows:

> "The Petitioner seeks to have this Court reconsider and overrule the majority opinion in *Murphy v. State*, 596 So. 2d 42 (Ala. Civ. App., 1991), cert denied 596 So. 2d 45 (1991), and to adopt as the majority opinion the reasoning issued by

Justice Maddox in his dissent which strikes down gender based peremptory jury challenges."

On October 23, 1992 the Alabama Supreme Court denied Petitioner's Writ of Certiorari to the Alabama Court of Civil Appeals. [JA 43]

The Petition for Writ of Certiorari to the Alabama Supreme Court was presented to this Court on January 20, 1993. Certiorari was granted on May 17, 1993 and is now before this Court for review.

SUMMARY OF ARGUMENT

The 14th Amendment to the Constitution of the United States guarantees against governmental action which differentiates between persons because of their inclusion in certain groups. In order to survive the heightened scrutiny accorded to the classification of individuals based upon their gender, the state must show that the classification is substantially related to an important governmental interest. The use of peremptory jury strikes to exclude jurors from the jury panel solely because of their gender violates the equal protection rights of both the excluded juror and the nonstriking party. Further, such a discriminatory action within the Court system casts a disparaging shadow upon the entire judicial process. The protection previously extended to jurors based upon their race should, upon the equal protection principles of the 14th Amendment, be applied to jurors who are excluded from the jury process solely by the accident of birth.

Legal scholars and trial advocates have historically recognized the importance of the peremptory challenge in securing a fair and impartial trial. However, there is no constitutional basis for exercising this privilege and its use has been altered and modified by legislative enactment and courtroom practice. Court imposed restrictions on its use have evolved in order to promote the principles of equal protection and the elimination of wrongful discrimination in the jury selection process. Therefore, the significant state interest in providing litigants, both civil and criminal, a fair and impartial trial can only be accomplished by applying the principles found in *Batson v. Kentucky* to preclude gender-based peremptories.

The State's use of its peremptory strikes to eliminate male jurors from the jury solely because of their gender denies to the Petitioner and the excluded jurors the equal protection of the law.

ARGUMENT I

THE EQUAL PROTECTION PRINCIPLES UPON WHICH *BATSON V. KENTUCKY* AND ITS PROGENY ARE FOUNDED ALSO PROHIBIT PEREMPTORY CHALLENGES BASED SOLELY UPON A PERSON'S GENDER.

Do the underlying principles of the equal protection clause set out in *Batson v. Kentucky* also apply to the use of peremptory jury strikes which are based solely upon a person's gender? A logical and constitutionally reasoned review requires an affirmative response.

The 14th Amendment to the United States Constitution provides in part that "no state shall . . . deny to any person within its jurisdiction the equal protection of the law." This "Equal Protection Clause" has been interpreted to provide to the citizens of the various states protection from discriminatory practices under numerous and diverse circumstances. A heightened level of scrutiny has been extended to those included in "cognizable" groups that have been subject to historical discriminatory practices. Such protection has been applied to discrimination against persons because of their race, national origin, alienage, religion and *gender*. Although a level of scrutiny applied to protect these groups may vary, each of them has been extended some heightened level of protection under the Equal Protection Clause.

Over the years this Court has developed different levels of scrutiny depending upon the circumstances and historically unequal treatment of the particular cognizable group. Generally, if the state's interest being promoted by the classification is insufficient, then the discriminatory treatment must be abolished. State supported action which makes a distinction based solely upon one's gender, is subject to heightened scrutiny under the Equal Protection Clause of the 14th Amendment. Only if the proponent of the action can prove that the gender-based distinction is substantially related to a sufficiently important governmental interest can the distinction be maintained. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

Therefore, gender, like race, is a protected classification which requires heightened scrutiny by the Court.

The gender characteristic "frequently bears no relation to ability to perform or contribute to society," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), and generally "provides no sensible grounds for differential treatment," *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The gender based protection of the 14th Amendment applies to males as well as females. *Orr v. Orr*, 440 U.S. 268, 278-80 (1979); *Craig v. Boren*, 429 U.S. at 204.

The Sixth Amendment protection this Court extended to persons who may be excluded from the jury venire because of their race in *Strauder v. West Virginia*, has likewise been extended to persons based upon their gender. *Taylor v. Louisiana*, 419 U.S. 522 (1975). This Court held in *Holland v. Illinois*, 493 U.S. 474 (1990), that race based exclusions are no more permissible at the individual petit jury stage than at the venire stage. Likewise, *gender-based* exclusions should be no more permissible at the individual petit jury stage than at the venire stage.

No substantial state interest is promoted by allowing jurors to be peremptorily eliminated from the jury solely because of the accident of their birth. The interest of the state in a jury trial, whether it be civil or criminal, is to see that the individual jurors are selected in a fair, impartial and non-discriminatory manner. Purposeful discrimination in the selection of the jury "violates a defendant's rights to equal protection because it denies him [or her] the protection that a trial by jury is intended to secure". *Batson*, 476 U.S. at 86. Although that statement was made as it relates to racial discrimination, the same logic and reasoning applies to discrimination in the selection of jurors based upon their gender. Discrimination in the

exercise of peremptory challenges undermines the litigant's perception that he is getting a fair trial, and that justice has been served. Still, the Court went further when it held unequivocally and clearly, without limitation to race, that "the privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause." *Batson*, 476 U.S. at 89. The U.S. Court of Appeals for the Ninth Circuit has specifically stated that "gender discrimination during jury selection is not substantially related to the achievement of an important governmental interest" and is therefore prohibited by the principles of equal protection. *United States v. DeGross*, 913 F.2d 1417, 1422 (9th Cir. 1990).

Since *Batson*, the fact situations of the significant decisions of this Court dealing with the discriminatory use of peremptory challenges have dealt with the issue of race. *Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. ___, 111 S. Ct. 2077 (1991); *Georgia v. McCollum*, 505 U.S. ___, 112 S. Ct. 2348 (1992). While earlier Supreme Court decisions have not reached the issue of gender-based peremptions, nothing in the wording of those decisions limits their holdings to the specific context in which they were decided. However, the Court has stated, without limitation to the issue of race that "if a court allows jurors to be excluded because of *group bias*, (emphasis added) it is a willing participant in a scheme that could only undermine the very foundation of our system of justice -- our citizens' confidence in it," *McCollum*, 112 S. Ct. at 2354. The Court had earlier stated that "[b]y enforcing a *discriminatory* peremptory challenge, the Court has not only made itself a party to the [biased act], but 'has elected to place its

power, property and prestige behind the [alleged] discrimination'." *Edmonson*, 111 S. Ct. at 2085 (emphasis added) (citations omitted). Although rendered in cases involving racial discrimination, the Court's holdings imply, if not stated unquestionably, that the Equal Protection principles set out in *Batson* are applicable to all cognizable groups which are traditionally protected by the 14th Amendment. The implication is made clear in this Court's opinion in *Georgia v. McCollum* where, quoting from *Ristaino v. Ross*, 474 U.S. 589, 596 (1976), it stated that "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption – a *per se* rule – that justice in a court of law may turn upon the pigmentation of skin, *the accident of birth*, or the choice of religion." 112 S. Ct. at 2359 (emphasis added). Even opinions which did not agree with the majority holding in the *Batson* line of cases have recognized the logical inclusion of gender-based strikes. Then Chief Justice Burger's dissent in *Batson* reasoned that the application of traditional equal protection principles to discriminatory peremptory challenges based upon other protected classifications, including gender, would supply the same measure of protection as the majority opinion applied to race-based exclusions. *Batson*, 476 U.S. at 124.

If the principles of *Batson* do not apply to gender-based peremptory jury strikes then this Court's expressed purpose of eliminating racial discrimination in the jury selection process would be partially compromised. Black jurors may be treated differently based upon their gender. For example, in a hypothetical situation where a white female juror, a black female juror and a black male juror are peremptorily struck, each may find a different result

if they object to being eliminated. The white woman juror's cries of discrimination will not even be heard by the court. The black woman juror's objection will be given an audience by the court but the striking party need only articulate that she was struck, not because of her race, but because of her gender. On the other hand, the black male juror's objection will be sustained and he will be seated on the jury. Thus, in any given case, if gender-based strikes are not prohibited, it will be constitutionally permissible to peremptorily strike all of the black jurors of one gender or the other without violating the Equal Protection Clause of the Fourteenth Amendment. Such result is certainly not that which was intended by this Court in *Batson*. The decisions of the Court in *Powers*, *Edmonson*, and *McCollum* have expanded rather than restricted the principles of Equal Protection. Extending these principles to classifications protected by the court's heightened scrutiny, including gender, is the next logical step in completing the process of making the exercise of peremptory challenges subject to the Equal Protection Clause of the Fourteenth Amendment.

Therefore, under the heightened scrutiny of equal protection principles applicable to gender-based classifications, the state's use of its peremptory challenges to eliminate males from the jury solely because of their gender violates the Equal Protection Clause of the 14th Amendment and is governed by the principles set out in *Batson*.

ARGUMENT II

THE USE OF DISCRIMINATORY, GENDER-BASED JURY STRIKES HAS A SUBSTANTIAL ADVERSE IMPACT UPON THE EXCLUDED JUROR, THE JUDICIAL SYSTEM AND SOCIETY AS A WHOLE

With its foundation resting securely on the third party standing issue found in *Batson* and *Powers*, the Court in *Georgia v. McCollum*, 505 U.S. ___, 112 S. Ct. 2348 (1992) unquestionably established that either party to a criminal or civil proceeding has standing to challenge the exclusion of a juror solely because of that juror's race. This standing is extended to the litigant, in part, because of the harm done to the excluded juror as well as to society as a whole. *Batson*, 476 U.S. at 87; *Powers*, 499 U.S. ___ (1991); *Edmonson*, 500 U.S. ___, 111 S. Ct. 2077 (1991). "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." *Powers*, 499 U.S. ___ (1991). When a potential juror is excluded from jury service based on a reason unrelated to that potential juror's ability to serve, he or she is denied the opportunity to participate in the judicial process and receives the message that their contributions are less important to society. Citing as authority *Carter v. Jury Commission of Green County*, 396 U.S. 320 (1970), the *Powers* Court affirmed that a State may not extend the right, privilege or duty of jury service to some and withhold the same from others solely on racial grounds. *Powers*, 499 U.S. ___ (1991).

In the instant case, following the reasoning of *Batson*, the nine men struck from the jury panel by the state were denied the right to serve on the jury simply because of

their gender. A juror's competence to serve on a jury "ultimately depends on an assessment of individual qualifications and ability to impartially consider" the evidence of a particular case regarding the type of case, the parties involved and the jurors expressed views on the matter. *Batson*, 476 U.S. at 87. A juror's gender is completely unrelated to the ability of that juror to contribute to the process.

Purposeful, unconstitutional discrimination in the exercise of peremptory jury strikes based solely upon a jurors gender destroys confidence in the fairness of the judicial system. "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principle justifications for retaining the jury system." *Powers*, 499 U.S. ___, 111 S.Ct. at 1368. It is this *opportunity* to serve, and to not be summarily excluded because of discriminatory presumptions, which gives citizens the hope of participation in the fair administration of justice. "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Id*. 111 S.Ct. at 1369.

The discriminatory exclusion of jurors because of their gender not only violates the objecting party's rights under the 14th Amendment, and tarnishes the Court's image before its citizens, but also violates the equal protection rights of the wrongfully excluded jurors. *McCollum*, 505 U.S. ___, 112 S.Ct. at 2357; *Edmonson*, 500 U.S. ___, 111 S.Ct. at 2081; *Powers*, 499 U.S. ___, 111 S.Ct. at 1368. Since the individual juror who had been wrongfully excluded has no realistic means of protecting his or her own rights, the nonstriking party has been granted

standing to assert the equal protection rights of one so excluded. *Edmonson*, 500 U.S. ___, 111 S.Ct. at 2081.

The *Powers* Court found that the relationship between the excluded juror and the defendant to be significant, even though they were not of the same race. Both the litigant and the excluded juror have a common interest in eliminating discrimination from the judicial process. This "congruence of interests makes it necessary and appropriate for the defendant to raise the right of the juror". *Powers*, 499 U.S. ___, 111 S.Ct. at 1372. As citizens, the Petitioner and the excluded jurors, Mr. Venable, Mr. Casey, Mr. Davis, Mr. Prince, Mr. Adkins, Mr. Lusk, Mr. Bishop, Mr. Brooks and Mr. Daniels, each have an interest in eliminating gender bias and discrimination from the courthouse.

The barrier to suit brought by an excluded juror is so great that he or she has no realistic opportunity to assert their own rights. The litigant is granted the burden of protecting those rights in their stead. *Id*. 499 U.S. ___, 111 S.Ct. at 1364.

Still, there must be some governmental action or involvement in the discriminatory practice before the 14th Amendment provides protection. In *Batson* and *Powers* the discriminatory peremptory strikes were exercised by the state prosecutor, involving obvious state action. In *Edmonson* and *McCollum* the exclusions were made by legal counsel acting on behalf of private party with no employment connection with the government. Yet the Court found there to be sufficient state involvement in the process to invoke the 14th Amendment protection because of the state's promotion of the judicial

process. In the matter presently before the Court, which is civil in nature, the action was brought by the State of Alabama through the District Attorney's office and is now pursued on behalf of the state by the Assistant Attorney General for the State of Alabama, on behalf of T.B. The Alabama Court of Civil Appeals in its opinion recognized this relationship in its opinion which began "The State of Alabama, on behalf of T.B. (mother) filed the complaint for paternity and child support". *J.E.B. v. State Ex rel. T.B.*, 606 So. 2d 156 (1992). Thus, much like *Batson* and *Powers*, the state's involvement and support of the discriminatory practice is direct in nature.

Therefore, the use of gender-based peremptory strikes, like those based upon race, casts doubt upon the integrity of the jury selection process and the Court's ability to actually provide the citizens "equal protection under the law."

ARGUMENT III

APPLYING THE STANDARDS OF *BATSON* AS EXTENDED TO GENDER BASED PEREMPTORY JURY STRIKES, THE FACTS OF THE CASE PRESENTLY BEFORE THE COURT ESTABLISH A VIOLATION OF THE EQUAL PROTECTION CLAUSE SUCH THAT A REMAND IS REQUIRED.

In order to sustain an equal protection objection to the use of peremptory jury strikes, the party making such challenge (whether prosecutor, plaintiff or defendant in a criminal or civil action) carries the burden of proving a multi-pronged standard. Under these *Batson* standards, as

extended by *Powers, Edmonson* and *McCollum*, upon challenge by the non-striking party, the Trial Court must make the following determinations:

> 1. Does challenging party or the excluded juror or jurors belong to a cognizable group entitled to protection under the Equal Protection Clause.
>
> 2. Were members of the cognizable group removed from the panel by peremptory strikes.
>
> 3. From a totality of the circumstances, was there an inference raised that the opposing party used its peremptory strikes to exclude the veniremen from the petit jury on account of their inclusion in the protected group.
>
> 4. Once the challenging party has made a prima facie showing of purposeful discrimination, the striking party come forward with an articulated neutral explanation for excluding such jurors.

If the challenging party establishes a prima facie showing that the jurors were discriminatorily excluded, and the striking party cannot articulate a sufficiently neutral reason for the exercise of its strikes against those jurors, it would be reversible error for the Trial Court to allow such strikes. An examination of each of these factors respectively in the context of the facts of the present case will reveal a clear violation of the petitioner's equal protection rights under the 14th Amendment.

(1) Is the petitioner or are any of the excluded veniremen a member of a cognizable group entitled to the protection of the 14th Amendment? The petitioner is a white male. The excluded jurors, save one, were of the

same race and gender. White males comprise a cognizable protected classification. *Mississippi University for Women v. Hogan, supra* (males); *Craig v. Boren*, 492 U.S. 190 (1976) (males); *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989) (whites). Thus, the first prong of the test has been satisfied.

(2) Did the striking party use its peremptory challenges to remove members of this cognizable group? Yes. The State used nine out of its ten peremptory strikes to remove males from the jury panel.

(3) Has the petitioner raised in inference that the State used its peremptory challenges to exclude male veniremen from the jury because of their gender?

The jury venire consisted of thirty-six jurors, twelve male and twenty-four female. Two of the male jurors and one of the females were struck by the State for cause [JA 20-21]. The panel presented to the parties for the exercise of the peremptory challenges consisted of ten males and twenty-three females. The State exercised nine of its ten peremptory strikes to eliminate males from the jury. The only female struck by the State was juror number 32, Mrs. Eva Parks who was a friend of counsel for the defendant and attended church with him [JA 6]. The male members of the panel were particularly quiet during voir dire. Of the ten males, not challenged for cause, few of them responded to any of the voir dire questions. Mr. Casey, Juror number 23, knew Ms. B and lived in the same community with her. [JA 12] Mr. Cooper, number 15, and Mr. Bishop, number 27, were co-employees of Ms. B's father. [JA 13, 14] Juror number 19, Mr. Brooks was paying child support through the Court. [JA 18]

Therefore, the State peremptorily struck six of the male jurors who made no response whatsoever to the voir dire questions. Two of its additional strikes were made against males who, on the surface, would be more favorable to the State's position than to the petitioner. Thus, it can be inferred that the State excluded the male jurors from the panel solely because it was *presumed* that the male jurors would be more inclined to relate to Mr. B than to Ms. B. The only other logical explanation for excluding Mr. Casey and Mr. Bishop was because they knew of some character flaw or unfavorable factor about Ms. B, which was not revealed on voir dire. If that were the case, then under the fourth standard of *Batson*, the State would have articulated such reason to the Trial Court if a hearing had been held.

The example of facts which may give rise to an inference of unconstitutional exclusion as provided by the Court in *Batson* are directly on point. There, the Court opined that a pattern of strikes against jurors of the protected group may give rise to an inference of discrimination. *Batson v. Kentucky*, 476 U.S. at 97. Under Alabama's interpretation of the *Batson* principles, the Appellate Courts have held that the use of nine of twelve peremptory strikes to eliminate all blacks from the jury was sufficient evidence, in and of itself, to establish a prima facie case of deliberate discriminatory use of peremptory strikes. *Williams v. State*, 548 So. 2d 501 (Ala. Crim. App. 1988), *cert. denied*, 489 U.S. 1028 (1988). The striking of nine blacks and one white from a qualified venire consisting of ten blacks and thirty-two whites was found by the Georgia Court to be an overwhelming pattern of strikes establishing a prima facie evidence of

discrimination. *Ford v. State*, 423 S.E.2d 245 (Ga. 1992). The Georgia Supreme Court also found the prosecutions use of nine out of ten strikes against black jurors to be prima facie evidence of discrimination, even though eight of the twelve jurors ultimately selected to serve were black. *Berry v. State*, 422 S.E.2d 861 (Ga. 1992).

Additionally, the Court can consider that the State did not peremptorily strike any of the female jurors who failed to respond to the voir dire questions. The prosecutor's failure to specifically question any of the black jurors he struck, *Jackson v. State*, 557 So. 2d 855 (Ala. Crim. App. 1990), and the prosecutor's failure to engage prospective black jurors in more than "desultory voir dire" or to ask them any questions at all, before striking them peremptorily, *Parker v. State*, 568 So. 2d 335 (Ala. Crim. App.), *cert. denied*, 1990 Ala. Lexis 801 (Aug. 31, 1990), are factors supporting an inference that the challenges were, in fact, based upon group bias. Also see *People v. Smith*, 602 N.E.2d 946 (Ill. App. 1992), in which a prosecutor struck black jurors responding to certain questions, but did not strike white jurors responding in a similar manner.

The State's use of six of its peremptory strikes to exclude male jurors who had failed to respond to any voir dire questions and two male jurors who could have potentially been favorable to the State, is more than sufficient to raise an inference that they were struck solely because of their gender.

(4) Having established a prima facie case that the State had exercised its peremptory challenges to deliberately exclude potential male jurors solely because of their

gender, the burden is then placed upon the State to articulate some reason for the challenges other than their gender. If such hearing had been held by the Trial Court *at the time of trial*, the State would have been given the opportunity to explain its reasons for striking two potentially favorable jurors. However, in this case, as in *Batson*, the Trial Court summarily rejected the defendant's objection without conducting a hearing upon the issue.

Therefore, this case must be remanded with instructions to grant the Petitioner a new trial or in the alternative to conduct an evidentiary hearing in conformity with the principles set out in *Batson*.

ARGUMENT IV

THE STATE'S HISTORICAL RIGHT TO USE ITS STRIKES IN A PEREMPTORY MANNER MUST YIELD TO A CHALLENGE BASED UPON THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT.

Throughout the history of jurisprudence, it has been recognized that "the right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial." W. Forsyth, *History of Trial by Jury* 175 (1852). While this Court has on more than one occasion extolled the virtues of the peremptory challenge by holding that "the persistence of peremptories and their extensive use demonstrate a long and widely held belief that peremptory challenge is a necessary part of trial by jury", and further that "the challenge is one of the most important of the rights secured to the accused." *Pointer v.*

United States, 151 U.S. 396 (1894). The right to employ such peremptory challenges in a trial by jury, however important to the administration of justice, has been subjected to important constitutional limits.

In his dissenting opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986) Chief Justice Burger tracked the use of the peremptory challenge as far back as B.C. 104 where it was in use by the Roman government. It is stated that in the trial of a criminal case during that period, the accused and the accuser would each summon one hundred "judices" for the trial. They would then in turn proceed to summarily reject fifty of those summoned by the other party. *Id.* at 119.

In one of the premier cases before this Court dealing with peremptory challenges, the Court traced the history of the challenge to the common law of England. *Swain v. Alabama*, 380 U.S. 202 (1965). As originally allowed there, the prosecutors' unfettered use of this power led to "infinite delays and danger." *Coke on Littleton* 156 (14th ed. 1791). These abuses resulted in restrictions or limitations on the prosecution's use of its peremptories by the enactment of *The Ordinance for Inquests*, 33 Edw. 1, Stat. 4 (1305). According to this Ordinance, the prosecutor was required to give a "cause certain" for the use of its challenges. The defendant's right to peremptory challenges was likewise modified when in 1530 the number of such challenges was reduced from thirty-five to twenty. See 22 Hen. 8, c. 14, § 6 (1530); 25 Hen. 8, c. 3 (1533).

Even though the use of challenges without cause was protected as an important and essential part of a fair and just judicial system, it did not remain without change.

Thus, the use of peremptory challenges in England has survived from the early formative days of the common law until the present time. Even so, its practice has fallen into great disuse and its exercise has been rare in England for over a century. *Swain v. Alabama*, 380 U.S. at 212. The form of the exercise of peremptory challenges has been altered over the centuries, sometimes restrictions being placed on its exercise because of the unfairness resulting from the use of its privilege.

In our country, the availability of peremptory challenges during a jury trial was adopted early on by Congress. In 1790, Congress adopted an ordinance to provide the defendant with thirty-five peremptory challenges in trials for treason and twenty in trials for other specified felonies. 1 Stat. 119 (1790). The number of challenges allowed to both sides in a Federal criminal case has been altered from time to time by both statute and procedural rule. 17 Stat. 282 (1872); 36 Stat. 1166 § 287 (1911); *Fed. R. Crim. P.* 24(b).

Thus, the use of peremptory challenges became an early part of the American judicial system. The various states have likewise recognized the importance of the peremptory challenge to their respective judicial systems. Alabama initially adopted the peremptory challenge system of selecting jurors in both criminal and civil trials. However, in 1909 the Legislature abolished the system in criminal trials as it was traditionally used in favor of the "struck-jury" method. Alabama Code § 7275 (1909), under which the prosecutor and the defendant alternately "strike" the name of a venire person from a list until only 12 remain. Alabama Code § 8641 (1923); Alabama Code Title 30 § 60 (1958); Alabama Code § 12-16-100 (1975).

Rule 18.4 of the *Alabama Rules of Criminal Procedure* which now governs the striking process, provides that after the voir dire examination of the jury and challenges for cause have been exercised, the Court shall cause a list to be compiled of the remaining qualified jurors numbering not less than 36 in a capital case and 24 in a felony case. From the list the district attorney shall first strike "from the list the name of one (1) juror; the defendant shall next strike the name of one (1) juror. They shall continue to strike off names alternately until only twelve (12) jurors remain on the list, and the (twelve) 12 thus selected shall be the jury charged with the trial of the defendant." Ala. R. Crim. P. 18.4(f)(2).

In civil actions the option for the "challenge method" of jury selection was retained by the Alabama Legislature until the *Rules of Civil Procedure* were first adopted in 1975. Until then, the *Code* provided that "each party has the right to challenge four (4) of the jury peremptorily in civil cases." Alabama Code Title 30 § 53 (1958). Under Rule 47 of the *Alabama Rules of Civil Procedure*, the challenge method of jury selection had been abolished in favor of the struck jury method found in criminal cases.

As in the Federal court system, the method of jury selection in Alabama has not remained unchanged over the years. In fact, it has been in a constant, gradual state of change during this entire century. Although the "struck-jury" method of selecting the jury involves a different process than the original "challenge method." each party still maintains the right to exercise not less than six (6) challenges "without cause", thus peremptorily. *Holman v. Baker*, 277 Ala. 310, 169 So. 2d 429 (1964).

Thus, the importance of peremptory challenges to the American judicial system was recognized and established early on. However, as with the precolonial use of peremptory challenges in England, its use in this country has not been without modification and alteration. In *Swain v. Alabama*, this Court first broke with the tradition of allowing *unquestioned* use of the challenge without cause. There, it was determined that a defendant in a criminal case has the right to object to a prosecutor's use of its peremptory challenges based on the Due Process Clause of the 14th Amendment. The Court placed the evidentiary burden of proof upon the defendant to establish that a prosecutor has systematically used its challenges to exclude prospective jurors from the jury because of their race and concluded that such a pattern of systematic use must be established by a showing of exclusion by the prosecutor "for many years". 380 U.S. at 227-28. Although the Court in *Swain* upheld the State's right to exercise its peremptory challenges in a particular case based upon the juror's race, it held for the first time that such a right is not absolute and it would be *possible* to challenge the State's use of peremptory strikes under the appropriate circumstances.

The wound administered by *Swain* to the unfettered use of peremptory challenges festered within the American judicial system for more than twenty years. Prosecutor's continued to use their peremptory challenges to exclude jurors based upon the accident of their birth. As it relates to a criminal defendant's right to challenge the State's use of its peremptory strikes to eliminate jurors because of their race, the metamorphosis of the process which was begun by *Swain* culminated in the landmark

decision of *Batson v. Kentucky*, 476 U.S. 79 (1986). There, for the first time, this Court held that based upon the facts of an *individual* case, a defendant in a criminal case had the right to challenge the prosecutor's systematic exclusion of jurors based solely upon their race. In so holding, the Court recognized the standard of *Strauder v. West Virginia*, 100 U.S. 303 (1880) which held that the defendant has no right to a "petit jury composed in whole or in part of persons of his own race," *id.* at 305, but went on to say that the defendant does "have the *right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria.*" (emphasis added). *Batson*, 476 U.S. at 85-86. *Batson* was based upon the premise that the Equal Protection Clause of the 14th Amendment guarantees the defendant that the State will not exclude members of his race from jury service on account of their race, or on the false assumption that members of his race as a group are not qualified to serve as a juror. *Strauder*, 100 U.S. 303 (1880); *Norris v. Alabama*, 294 U.S. 587 (1935). Quoting from *Blackstone Commentaries*, the Court held that those on a venire must be "indifferently chosen" to secure the defendant's right to the equal protection of the laws under the 14th Amendment. *Batson*, 476 U.S. at 87; 4 W. Blackstone, *Commentaries* 350 (Cooley Ed. 1899).

Batson, which concerned a criminal defendant's right to challenge the prosecutor's use of peremptory strikes to exclude members of the jury based on their race, went on to establish the procedure by which such use could be challenged. 476 U.S. at 96. In order to preserve such a challenge, the party making the challenge must:

A. Object to the use of the peremptory strikes at the earliest possible moment, certainly

before the jury is empaneled. *Dias v. Sky Chefs, Inc.*, 948 F.2d 532 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1294 (1992).

B. Show that he or she is a member of a cognizable group protected by the equal protection clause. *Batson*, 476 U.S. at 96.

C. Demonstrate that the prosecutor has exercised its peremptory challenges to remove from the venire members of the movant's race. *Id.*

Once the defendant is able to make out a prima facie case of purposeful discrimination, the burden shifts then to the prosecutor to articulate nondiscriminatory reasons for its use of the strikes.

The holding and reasoning of *Batson* has been further expanded and modified since it was rendered in 1986. In *Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364 (1991), the Court held that under the Equal Protection Clause of the 14th Amendment, a criminal defendant may object to the race-based exclusion of jurors through peremptory challenges whether or not the defendant and the excluded jurors shared the same race. This decision was founded in part upon the Court's recognition in *Batson* that a prosecutor's discriminatory use of peremptory challenges harms not only the defendant, but also the excluded juror and the community as a whole. In *Edmonson v. Leesville Concrete*, 500 U.S. ___, 111 S. Ct. 2077 (1991), the Court further defined the principles of *Batson* in holding that a private civil litigant may raise the equal protection claim of a person whom the opposing party has excluded from jury service on account of their race. This decision, much like *Powers*, was based in part upon the "well established rules of third party standing" holding that a defendant may raise the excluded juror's equal protection rights.

111 S. Ct. at 2081. In a further extension of *Batson*, this Court has held that the restrictions on the use of peremptory challenges applies to the defendant as well as to the prosecution in a criminal case. *Georgia v. McCollum*, 505 U.S. ___, 112 S. Ct. 2348 (1992).

Thus, the peremptory challenge, as an institution of the American judicial system, has been changed and modified by legislative enactment over the past two hundred years. Beginning with *Swain* and culminating in *Batson* and its offspring, the exercise of the peremptory challenge, has been required to adapt to the limitations and protections offered by the 14th Amendment. Yet, with these Constitutional protections in place, the "challenge without cause" may remain a vital part of the process for selecting a fair and impartial jury.

CONCLUSION

Based upon the citations of authority and the arguments contained in this Brief, the Petitioner respectfully prays that this Court will extend the *Batson v. Kentucky* equal protection principals to gender based peremptory challenges and reverse the decision of the Alabama Court of Civil Appeals, remanding this action with instructions for the entry of an order for new trial in the Circuit Court of Jackson County, Alabama, or in the alternative, to conduct an evidentiary hearing giving the State the opportunity to articulate a gender-neutral basis for its strikes.

Respectfully submitted by:

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